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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1619

HOWARD WATERHOUSE and NANCY HALL,
Petitioners,

v.

JOHN N. MITCHELL, GEORGE C. BEALL, JOHN DOE (Victor Frenkil), and RICHARD ROE (Baltimore Contractors, Inc.), *Respondents.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS FRENKIL AND BALTIMORE CONTRACTORS, INC. IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals is unreported and is printed in the appendix to the Petition for Certiorari (App. 1-2). The opinion of the district court is reported at 315 F. Supp. 662 and is printed in the appendix to the Petition for Certiorari (App. 2-35).

JURISDICTION

The judgment below was entered February 16, 1971. The Petition for Certiorari was filed April 23. Jurisdiction is based on 28 U.S.C. § 1254(1).

ISSUES PRESENTED FOR REVIEW

1. Whether a purported "indictment" delivered by the grand jury to the district court, which the attorney for the United States refused to sign, was sufficient to initiate a federal criminal prosecution?

2. Whether the district court had the power to order the United States Attorney to sign the "indictment" and to prosecute the parties named in it?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These are set forth in the Petition for Certiorari (Pet. 2-5).

STATEMENT

On May 28, 1970 the Deputy Foreman of the grand jury appeared before the United States District Court for the District of Maryland and delivered a "presentment" which recited that the grand jury wished to institute formal charges against specific individuals. The Foreman also delivered a draft form of indictment containing those charges, but bearing no signatures. The United States Attorney informed the court that the Department of Justice refused to authorize his signature on the indictment (App. 4).

The proceedings were continued until June 10 when the Deputy Foreman returned to the court and reported that the grand jury wished to return an indictment whether or not signed by the United States Attorney. The court stated that the United States Attorney was permitted and perhaps required to prepare

a proposed indictment, as requested by the grand jury, but that the court could not require him to sign it (App. 6).

On June 15 Frenkil and Baltimore Contractors, Inc., proceeding under the names John Doe and Richard Roe, filed a petition in the district court stating that each was the subject of the investigation by the grand jury and each was prominently mentioned in the draft indictment which had been delivered to the court. They requested an order prohibiting public disclosure and expunging from the records of the court the May 28 report (App. 6-7).

On June 17 the grand jury came before the court again and delivered an "indictment" bearing the signature and title of the Deputy Foreman, but not signed by the United States Attorney or any other attorney for the United States. The United States Attorney again informed the court that he had been instructed by the Department of Justice not to sign the "indictment." He filed a Criminal Division report, approved by the Assistant Attorney General, stating that "there is insufficient legal basis and supporting evidence to prove the charges made by the Grand Jury in this matter"; that the "evidence elicited by the investigation of this matter does not indicate that there was any conspiracy undertaken for unlawful purposes"; and that "neither Frenkil's conduct nor that of his other associates can be proven to be a violation of any criminal statute." (App. 33-34). The government also took the position that since the "indictment" submitted by the grand jury was not signed by a representative of the United States, it was not sufficient to initiate a criminal proceeding (App. 11).

On June 19 the district court held an *in camera* hearing on the petition to suppress and expunge. Immedi-

ately before that hearing, petitioners filed a document entitled Petition for Mandatory Injunction seeking to require the Attorney General and the United States Attorney to prosecute those persons charged in the unsigned "indictment."[1] At the hearing on June 19, the United States Attorney reiterated the government's opposition to signing the "indictment" and stated that if the "indictment" were held sufficient to initiate a prosecution, the government would, for the reasons set forth in the Department of Justice Memorandum, refuse to prosecute the action and "any such proceeding would eventually be subject to dismissal for want of prosecution." (Footnote omitted. App. 13).

The district court held that because the Attorney General or his representative refused to sign the "indictment" returned by the special grand jury, the document was void and a nullity. Chief Judge Thomsen relied primarily upon *United States* v. *Cox,* 342 F.2d 167 (5th Cir.), *cert. denied,* 381 U.S. 935 (1965), which held that the executive branch, in the exercise of its constitutional power to ensure that the laws are faithfully executed, has the discretionary power to refuse to prosecute a federal criminal case. Judge Thomsen concluded further that he had "no jurisdiction to order the Attorney General of the United States or the United States Attorney to sign the 'indictment' or to prosecute the persons named therein." (App. 22-23). The court then expunged from its records the documents submitted by the grand jury. It did disclose, however, a summary of the "presentment" which con-

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[1] That motion was treated by the district court as a motion to intervene. Petitioners did not participate in the June 19 proceeding and they had not participated in any of the proceedings prior to that date.

tained the substance of the charges in the indictment, and the names of the parties charged [2] and the court disclosed the Department of Justice Memorandum explaining its refusal to authorize prosecution (App. 31-35). The court of appeals affirmed in a *per curiam* opinion (App. 1-2).

ARGUMENT

The courts below were clearly correct in holding that the grand jury was without power to initiate criminal proceedings over the objection of the government attorney and by means of an "indictment" which did not bear his signature. The courts also correctly refused to compel the government to sign the indictment and prosecute it. Five hundred years of Anglo-American jurisprudence fails to disclose any instance in which individuals have been indicted and prosecuted over the objection of the attorney for the government. As the district court pointed out (App. 20), the issue of whether such a prosecution may be maintained has appeared in only one other decided case, *United States* v. *Cox, supra,* and thus it can hardly be considered an

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[2] There is a serious question as to the propriety of making these disclosures since they not only compromise the secrecy of the grand jury proceedings but they unfairly make serious criminal accusations, determined by the Department of Justice to be without foundation, against Frenkil and Baltimore Contractors, Inc. In such a case the grand jury publicizes accusations made after examining only one side of a case. The federal courts, recognizing the unfairness of publicizing grand jury reports making criminal accusations against specific individuals, and the lack of any public interest to be served by making such reports public, have expunged them from their records. *Application of United Electrical, Radio and M. Workers,* 111 F. Supp. 858 (S.D. N.Y. 1953; Weinfeld, J.); *In the Matter of the Report of the Grand Jury,* 4 U.S. Dist. Ct. of Hawaii 780. The disclosure issue was not, however, raised in the court of appeals by any of the parties, was not ruled upon by that court (App. 1-2), and is not presented to this Court.

important question of federal law which needs to be settled by this Court. Furthermore the decision below is fully in accord with *Cox* and there is, thus, no conflict of decisions. Accordingly review by this Court is not warranted.

1. The only way a federal criminal prosecution may be commenced is the filing of an indictment or information that complies with Rule 7, Fed. R. Crim. P. Rule 7(c) provides that an indictment "shall be signed by the attorney for the government." Neither the Federal Rules of Criminal Procedure nor any federal statutes establish a procedure by which a grand jury can return an indictment without the signature of an attorney for the government and over the specific objection of the United States Department of Justice.

Article II, Sections 1 and 2, of the Constitution vests the executive power in the President and provides that he "shall take care that the laws be faithfully executed."[3] The requirement of Rule 7(c) that an indictment bear the signature of an attorney for the United States is a recognition of the Executive's constitutional responsibility for instituting and controlling federal criminal prosecutions. That responsibility rests exclusively with the Executive, and as the courts below held, under the doctrine of separation of powers, the grand jury, an arm of the judiciary, may not override the Executive's decision (App. 21). *United States* v. *Cox, supra.*

In a concurring opinion in *Cox,* Judge Brown set forth additional reasons why a grand jury should not be permitted to initiate criminal proceedings over the

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[3] The presidential duty to execute the criminal laws of the United States is delegated to the Attorney General. *Ponzi* v. *Fessenden,* 258 U.S. 254 (1922). *See* 28 U.S.C. § 501, *et seq.*

objection of the Executive. The ultimate responsibility for whether criminal prosecutions should be brought is more appropriately placed in the Executive than in the grand jury because the Executive is accountable to the people and may be removed by them, while the grand jury operates in secret and has no public accountability. Furthermore, the Executive is more likely to be aware of those instances where the nation has important interests at stake which might be jeopardized by prosecution and he can make the decision whether to prosecute after weighing those interests. Finally the Executive has a better awareness of the statutory requirements necessary to maintain a prosecution. 342 F.2d at 182-83.

In holding that the grand jury could not, acting on its own, initiate criminal proceedings, the district court below relied heavily upon Judge Wisdom's concurring opinion in *Cox*. In that opinion he noted that there was not "one case holding that a court may compel a prosecutor to prepare and sign a bill of indictment requested by a grand jury." 342 F.2d at 185. He traced the history of the grand jury in detail and concluded that *"the grand jury never had a plenary power to indict."* 342 F.2d at 189. (Emphasis in original.) Judge Wisdom also pointed out that just as the grand jury was designed to protect individuals against unjust or overzealous prosecutions, the Executive was meant to be a check against overzealous or vindictive grand juries. 342 F.2d at 190.

Not only are petitioners without judicial support, but there is no historical basis for the claim that a grand jury has the right to initiate a criminal proceeding over the objection of the prosecutor. Indeed the procedure by which grand juries historically returned indictments was for them to vote on a bill of indictment which had

been submitted to them by the prosecutor.[4] Petitioners are unable to point to any evidence that the grand jury has ever had the power independently of, and over the objection of, the prosecutor, to initiate a criminal proceeding. As Chief Justice Marshall, sitting as a circuit justice observed, "the usage of this country has been, to pass over, unnoticed, presentments on which the attorney [for the government] does not think it proper to institute proceedings." *United States* v. *Hill,* 26 Fed. Cas. 315 (No. 15,364, C.C. Va. 1809).[5]

Thus there is neither historical support nor judicial precedent for the assertion that the grand jury has the power to indict individuals independently of any cooperation by the prosecutor. Moreover the argument that the grand jury clause of the Fifth Amendment authorizes such power completely misconceives the purpose of that provision and the entire Bill of Rights. At the time the Constitution was drafted, many people feared that it granted too much power to the newly created federal government. The Bill of Rights was added to allay those fears by placing specific limitations on the powers that could be exercised by any branch

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[4] *See IV Blackstone Commentaries* 302; 2 *Wilson's Works* 363; 4 Wharton, *Criminal Law and Procedure* § 1713, 471 (1957); *Application of United Electrical, Radio & M. Workers,* 111 F. Supp. 858, 863, fn. 13 (S.D.N.Y. 1953); Orfield, *Criminal Procedure from Arrest to Appeal* 157 (1947).

[5] Petitioners imply (Pet. Br. at 8) that *Hale* v. *Henkel,* 201 U.S. 43, 60 (1906), holds that the grand jury has plenary power. That case, however, deals only with the power to investigate; it does not even purport to consider the power to indict. There have been cases in which the grand jury was held to have independent inquisitorial powers. *E.g., United States* v. *Thompson,* 251 U.S. 407 (1920). But the power to inquire into possible violations of law is separate and distinct from the power to return an indictment, and, as we set forth above, there is no indication that a grand jury has the power, acting on its own, to return an indictment.

of the federal government.[6] The grand jury provision is an example of those limitations. The primary purpose of that clause is to protect individuals against an overzealous Executive who may institute arbitrary, vengeful or baseless criminal prosecutions. Yet petitioners would construe the grand jury provision not as a limitation upon the power of the federal government, but as an affirmative grant of power to the grand jury and the federal judiciary, over and above that granted in Article III of the Constitution, to institute criminal proceedings where the prosecutor refuses to do so. Nothing in the history of the adoption of that provision remotely suggests that it was intended as such an expansion of power.

2. The district court below held that it "has no jurisdiction to order the Attorney General of the United States or the United States Attorney to sign the 'indictment' or to prosecute the persons named therein." (App. 22-23). The court was clearly correct in so holding. There is an unbroken line of precedent holding that the Attorney General has absolute, unreview-

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[6] Madison in urging the adoption of the Bill of Rights said:

"It will be a desirable thing to extinguish from the bosom of every member of the community, any apprehensions that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled . . . . There is a great body of the people falling under this description, who at present feel much inclined to join their support to the cause of Federalism, if they were satisfied on this one point. We ought not to disregard their inclination, but . . . expressly declare the great rights of mankind secured under this Constitution . . . . [T]he great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the government ought not to act, or to act only in a particular mode." Vol. 1, Annals of Congress, 1st Cong., 1789-90, p. 432 and p. 437.

able discretion in determining whether or not to maintain federal criminal prosecutions. The reasons for that principle are variously stated, but all the authorities agree that the direction of governmental policy may not be forced by individual action or action by a grand jury. *See, e.g., United States* v. *Cox, supra; Peek* v. *Mitchell,* 419 F.2d 575 (6th Cir. 1970); *Powell* v. *Katzenbach,* 359 F.2d 234 (D.C. Cir. 1965), *cert. denied,* 384 U.S. 906 (1966); *Smith* v. *United States,* 375 F.2d 243 (5th Cir.), *cert. denied,* 389 U.S. 841 (1967) and cases cited therein, especially *Confiscation Cases,* 74 U.S. 454 (1869); *Pugach* v. *Klein,* 193 F. Supp. 630 (S.D.N.Y. 1961); *United States* v. *Brokaw,* 60 F. Supp. 100 (S.D. Ill. 1945). In view of this consistent line of cases from this Court and lower federal courts, there is no cause for review of this issue.

CONCLUSION

For the foregoing reasons the petition should be denied.

Respectfully submitted,

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